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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 426

MORIZO NAKASHIMA, as executor of the last will of Akira Morimoto, deceased,
Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Morizo Nakashima, as executor of the last will of Akira Morimoto, deceased, respectfully prays that a writ of certiorari to the United States Court of Ap-

peals for the Ninth Circuit issue to review the judgment in this case reversing a judgment of the United States District Court for the Southern District of California, Northern Division.

The opinion of the Court of Appeals was reported in 243 F. 2d 787. In the District Court the Honorable Gilbert H. Jertberg, District Judge, wrote an opinion, which was not reported but is set forth in the printed record in this case, pages 13-27, nine copies of which have been filed pursuant to Rule 21(4) of this Court.

JURISDICTION.

The judgment of the Court of Appeals was made and entered on April 5, 1957, and appellee's petition for a rehearing was denied on June 7, 1957. 28 U.S.C. Sec. 1254(1) confers jurisdiction on this Court to review the judgment of the Court of Appeals by writ of certiorari. The ground on which petitioner seeks to invoke the jurisdiction of this Court is one stated in paragraph 1(b) of Rule 19 of this Court, that is, that the Court of Appeals in this case decided an important question of federal law which has not been, but should be, settled by this Court.

QUESTION PRESENTED FOR REVIEW.

Where the property of an American citizen has been seized by mistake under the Trading with the Enemy Act, is such seizure by the United States a

taking of property without due process of law or without just compensation, where that Act denies return of the property solely because claim or suit for return was not filed within two years after such seizure and the Act affords no protection to persons under disability or beyond the seas, and said citizen and most persons affected by that statute of limitations were abroad at the time of enactment thereof and at the time of seizure of the property, and had no notice of such seizure?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Petitioner contends that Section 33 of the Trading With the Enemy Act (50 U.S.C. App. Sec. 33), the statute of limitations above referred to, deprives him of his property without due process of law and takes his property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or prop-

erty, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 33[1] of the Trading With the Enemy Act reads:

"No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from the enactment of this amendment, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to a successor organization designated pursuant to section 32(h) hereof if notice of claim is filed before the expiration of one year from the effective date of this Act. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a

[1]Section 33 added by Public Law 671, 79th Cong., approved August 8, 1946 (60 Stat. 925). Amended by Public Law 370, 80th Cong., approved August 5, 1947 (61 Stat. 784), by Public Law 874, 80th Cong., approved July 1, 1948 (62 Stat. 1218), by Public Law 292, 83d Cong., approved February 9, 1954 (68 Stat. 7), and by Public Law 626, 83d Cong., approved August 23, 1954 (68 Stat. 767).

suit or claim for return pursuant to section 9 or 32(a) hereof."

STATEMENT OF THE CASE.

Akira Morimoto was plaintiff in the District Court and will hereinafter be referred to as plaintiff. He died during the pendency of the case in the Court of Appeals and petitioner, his executor, was duly substituted as a party to the action. The plaintiff was born in Fresno, California on April 18, 1912. His parents were Japanese citizens and they never acquired American citizenship. They resided in this country from 1898 to 1924, with the exception of two years, 1917-1919 (R. 130). Plaintiff was a citizen of both the United States and Japan at all times material to this case (Finding V, R. 31).

Plaintiff was taken by his parents to Japan in 1924. His parents never returned to this country. Prior to 1924, plaintiff had attended grammar school in Fresno, and thereafter continued his education in Japanese schools, completing grammar school and high school in Hiroshima, graduating in 1930. When plaintiff reached the age of twenty years he became subject to compulsory military service in the Japanese Army. He was excused from taking the physical examination because he was attending medical college and was granted a deferment until he completed his medical course. Upon completion of his medical education he reported for duty at an army camp in Tokyo and entered the Army as a medical officer

candidate in October of 1938. He served as a doctor in the Army and was stationed in Manchuria until September 9, 1945, when he was captured by the Russians and taken to Siberia. He was held as a prisoner of war by the Russians until December 4, 1948, when he was released and returned to Japan. Plaintiff was very ill when he was returned to Japan, such illness having been caused by malnutrition during the aforesaid imprisonment; and he returned to the United States, filed claim for the return of his property (land in Fresno) which had been vested under the Trading With the Enemy Act, and commenced this action as soon as he reasonably could (Finding VI, R. 31-32). The vesting occurred December 17, 1947 (R. 29), the claim for the return of the vested property was filed October 17, 1950 (R. 11) and this action was filed on plaintiff's behalf on October 23, 1950 (R. 13). Plaintiff arrived in this country from Japan in December, 1950 (R. 49).

District Judge Jertberg gave judgment for the plaintiff under Section 9(a) of the Trading With the Enemy Act, which confers jurisdiction on the District Courts to order return of vested property to persons who are not enemies as defined in the Act. The Court of Appeals did not rule on the merits of plaintiff's claim, but reversed the judgment on the ground that the period of limitations prescribed by Section 33 of the Act expired December 16, 1949, two years after the vesting of property. Judge Jertberg's opinion (R. 13-27) did not discuss the statute of limitations but he made a finding in favor of plaintiff on

the issue (Finding X, R. 33). With reference to the statute of limitations the following discussion was had between Mr. Aten, counsel for plaintiff, and Mr. Barshay, counsel for defendant, at the opening of the trial (R. 37-38):

> "Mr. Aten . . . But I might ask counsel, Mr. Barshay, if the question of the statute of limitations is to be raised here.
>
> Mr. Barshay. No, it is not, because, if I recall correctly, Judge Beaumont ruled that the statute did not operate to bar the suit, and I presume without appeal that has become the law of the case.
>
> The Court. As I understand, he denied the motion to dismiss.
>
> Mr. Barshay. That is correct, on that ground, so I assume in the absence of appeal that becomes the law of the case. Incidentally, the law has been changed anyway and the time for filing claims has been extended, so that question is moot."

Later in the trial, however, Mr. Barshay reserved the right to raise the question on appeal (R. 82).

In the courts below plaintiff relied on the principle applied in *Hanger v. Abbott*, 6 Wall. 532, 18 L.Ed. 939, that statutes of limitation are tolled by war. About three weeks prior to the time set for the argument of this case before the Court of Appeals, this Court announced its decision in *Soriano v. United States*, 352 U.S. 270, 77 S.Ct. 269, holding that the rule of *Hanger v. Abbott* did not apply as against the sovereign and impliedly overruling the cases relied on by plaintiff. The Court of Appeals thereafter allowed

plaintiff to file a typewritten supplemental memorandum on the statute of limitations issue, but held that this action was barred by the statute and that the 1954 amendment thereto applied only to administrative claims, not to suits. On the constitutional phase of that issue the Court of Appeals said in part:

> "The power of Congress to provide for an immediate seizure in war times of property supposed to belong to the enemy is dependent upon adequate provision being made for its return in case of mistake. Central Trust Co. v. Garvan, 254 U.S. 554, 566. Whether adequate provision for such return has been made depends, among other things, on whether the period of limitation for the bringing of suits for return of seized property is reasonable. Appellee is therefore correct in contending that the reasonableness of the period of limitations presents a constitutional question."

The Court concluded, however, that the two year statute was reasonable.

ARGUMENT.

Petitioner submits that the Court of Appeals did not give proper weight to several material factors, most of which are set forth in the Congressional Committee Reports dealing with the 1954 amendment to Section 33 of the Trading With the Enemy Act. The report of the House Committee, which repeated in substance the Senate Report, said (1954-2, U.S. Code Congressional and Administrative News, pages 1997, 1998):

"Section 33 of the Trading With the Enemy Act of 1917 was added as an amendment to that act on August 8, 1946 (Public Law 671, 79th Cong.). It provided for a limitation of the period within which claims could be filed for the return of vested property. The limitation prescribed was 2 years from the date of enactment of the amendment or 2 years from the date of vesting of the particular property to which claim was being made, whichever date was later.

Within a short time it became apparent that a substantial number of persons were unable to file claims within the statutory limitation originally prescribed and, as a result, Congress enacted Public Law 874 of the 80th Congress, which extended the time for the filing of claims under the act until April 30, 1949, or 2 years from the date of vesting, whichever date was later. Notwithstanding this further extension of time, the question of another extension was raised soon after the expiration of the extended period. *The need for the present legislation revolves around the adequacy of the notice given to claimants of their rights and the adequacy of time within which such claimants could file their claims. Most of the persons whose property has been vested have, for a large part, been located abroad. Thus, while notice was published in the Federal Register, this notice was frequently never communicated to persons with residence abroad.*

. . .

From the evidence before the committee, it is evident that notice of the right to file for the return of property did not come to the attention of a substantial number of interested persons. In

many cases, this was by virtue of the serious dislocations in the world as an aftermath of war. In others, it was because governments were involved in the reconstruction of their devastated countries and were only able to give incidental attention to problems such as these. In still other cases, as illustrated above, the rights of some claimants were not sufficiently ascertainable prior to the deadline in order to enable them to pursue the remedy available to them. It is readily apparent, therefore, that it is both necessary and desirable to permit an extension of time for the filing of claims under the Trading With the Enemy Act so that persons such as those described earlier in the report may seek the return of their property. . . ." (Emphasis added).

McGahey v. Virginia (Ex Parte Brown) 135 U.S. 662, 701-708, 34 L.Ed. 304, 316 shows that considerations of the kind discussed in the above quoted committee report are relevant to determining the reasonableness of a statute of limitations. That case dealt with certain bonds of the State of Virginia, which were usable for the payment of certain state taxes and fines. Some years after issuance of the bonds, Virginia enacted a law limiting the future right to use the bonds for such payment to a period of one year after enactment of the law. The holding that this was unreasonable and unconstitutional was based in part on the fact that (135 U.S. 707-708, 34 L.Ed. 318):

> "These twenty thousand bonds would be likely to be scattered and dispersed through many States and countries, and it would be impracticable for the holders of them to use the coupons

> which the State should fail to pay in cash, in the alternative manner stipulated for in the contract, unless they had a reasonable time to dispose of them to taxpayers."

Similarly, the plaintiff in this case was absent from the United States and did not learn of the vesting of his property until some time after his return to Japan from imprisonment in Russia in December, 1948 (R. 48). Further, it appears from the aforesaid committee report dealing with the 1954 amendment to Section 33, that the occupation authorities gave little or no publicity to the April 30, 1949 deadline prescribed in Section 33 (U.S. Code Congressional and Administrative News, 1954-2, page 1998). Presumably, also, little or no publicity was given to the two year limitation prescribed in Section 33.

An additional factor showing the unreasonableness of Section 33 is that the section does not protect the rights of persons under disability or beyond the seas. Such protection has been incorporated in most statutes of limitation enacted since the year 1623. In *Hanger v. Abbott*, supra, the Court said (6 Wall. 538, 18 L.Ed. 942):

> "When our ancestors immigrated here, they brought with them the Statute of II, Jac. I. ch. 16, entitled 'An Act for the Limitation of Actions, and for Avoiding of Suits of Law,' known as the statute of limitations . . .
>
> Such statutes exist in all the states, and with a few exceptions they have been copied from the one brought here in colonial times . . ."

> Persons within the age of twenty-one years, *femes covert, non compos mentis,* persons imprisoned or beyond the seas, were excepted out of the operation of the 3d section of the act, and were allowed the same period of time after such disability was removed. Just exceptions, indeed, are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence."

Such exceptions are generally applicable in actions against the United States. 28 U.S.C. Section 2401(a) reads:

> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

28 U.S.C. Section 2501 contains a substantially identical provision dealing with Court of Claims actions. The plaintiff, an American citizen, was in a Siberian prison camp when his property was vested on December 17, 1947. He did not get back to this country until December, 1950 (R. 49). His rights would have been protected if Section 33 had included a provision similar to the second sentence of 28 U.S.C. 2401(a) supra (or to the first sentence thereof).

United States v. Greathouse, 166 U.S. 601, 41 L.Ed. 1130, shows that this Court has recognized that the

rights of persons beyond the seas should be protected. In that case a provision similar to the second sentence of Section 2401(a), supra, was by this Court read into the Tucker Act which had superseded but not expressly repealed an act (U.S. Rev. Stat. Section 1069) containing such a provision, the Court saying (166 U.S. 605, 41 L.Ed. 1131):

> "... But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost v. Wenie,* 157 U.S. 46, 58; *United States v. Healey,* 160 U.S. 136, 147.
>
> In conformity with this principle we must adjudge that the above proviso of U. S. Rev. Stat. Section 1069, is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently that the claim of a person who was beyond the seas at the time claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government. Although the act of 1887 prescribes the limitation for suits 'under this (that) act,' without making any exception in favor of persons under disability, it should be interpreted, as if the proviso in U. S. Rev. Stat. Section 1069 were added to Section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result."

In contrast with the regard shown for the exceptions for persons under disability in the *Hanger* and *Greathouse* cases, it was held in *Vance v. Vance*, 108 U.S. 514, 27 L.Ed. 808, that an exception in favor of minors is not essential to the constitutionality of a State statute of limitations. The Court said (108 U.S. 521; 27 L.Ed. 811):

> "... The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights. No such provision is made here for such exception, but, in place of it, the Legislature has made it the duty of the proper officer of the court to act for them."

We believe that the last sentence of this quotation distinguishes the *Vance* case from the case at bar. In any event, it seems clear that the failure to include the usual exceptions in a statute of limitations is one factor to consider in determining the reasonableness of the statute.

In this respect, Section 33 of the Trading With the Enemy Act is certainly a striking contrast to 28 U.S.C. Sections 2401(a) and 2501, supra, the statutes of limitation generally governing actions against the United States. Those sections allow six years in which to sue and safeguard the rights of persons beyond the seas and under disability, even in cases where the rights to be protected are purely statutory. This is

a case of constitutional right. A remedy under Section 9(a) of the Trading With the Enemy Act is essential to the constitutionality of the act, as the Court of Appeals recognized in this case. Yet Section 33 nullified that remedy in many cases (including this one) for at the time of the adoption of Section 33 in 1946 and the time of the vesting of the property, most people affected by the statute were abroad and frequently had no notice that their property was being confiscated.

The only reason given for the adoption of Section 33 was the desire to wind up the business of the Alien Property Custodian (1946 United States Code Congressional Service, page 1475, the House Committee Report), but we submit that mere convenience is no justification for the confiscation of property. This case comes very close to the second sentence of the following quotation from *Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 79, 56 S.Ct. 15, 18:

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the nonenemy owner either the return of his property or compensation for it. See Henkels v. Sutherland, supra; Central Union Trust Co. v. Garvan, supra, 254 U. S. 554, 566, 569, 41 S. Ct. 214, 65 L. Ed. 403; Stoehr v. Wallace, supra, 255 U.S. 239, 246, 41 S. Ct. 293, 65 L. Ed. 604. Plainly inadequate would be a remedy which could be availed of only while the Custodian or Treasurer continued to retain possession of the seized property or its proceeds, and

which would be lost whenever he disposed of the property and proceeds, whether lawfully or not."

Dated, Fresno, California,
August 30, 1957.

Respectfully submitted,

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(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian, Appellant, vs. Morizo Nakashima, Appellee.	No. 15,197 Apr. 5, 1957

Appeal from the United States District Court for the Southern District of California, Northern Division.

Before: Fee and Hamley, Circuit Judges, and Clark, District Judge

Hamley, Circuit Judge:

This is an appeal from a judgment for plaintiff in an action to recover property vested under the Trading with the Enemy Act, 50 U.S.C.A. App. § 1 et seq. Plaintiff Akira Morimoto died after the appeal was filed, and his executor, Morizo Nakashima, now appears as appellee.

Appellant contends that the district court lacked jurisdiction because the action was not brought within the period of limitation specified in § 33 of the act.

The real estate which is the subject matter of the suit vested in appellant on December 17, 1947, when the vesting order was filed with the Federal Register. A notice of claim to the property was filed with the Office of Alien Property, Department of Justice, on October 17, 1950. The original complaint herein was filed October 23, 1950.

The suit was commenced pursuant to § 9 (a) of the act. This statute confers jurisdiction upon district courts to entertain a suit in equity to establish the claimant's right to, and obtain the return of, property seized under the act. Section 33 of the act specifies the time within which notices of claim made pursuant to § 9 or § 32, and suits authorized by § 9, must be filed. Section 33, as it read when the instant notice and suit were filed, is quoted in the margin.[1]

---

[1]Section 33, as amended in 1948:

"No return may be made pursuant to section 9 or 32 [section 9 or 32 of this Appendix] unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 [section 9 of this Appendix] may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof [section 9 or 32(a) of this Appendix]."

It is conceded that, if the section as quoted is controlling, the suit was not timely filed. The two-year period following vesting had expired before either a claim or suit had been filed. Appellee, however, argues that the period of limitation for filing such suits was extended by the 1954 amendment of § 33, and that this suit was filed within the extended period. He also argues that, if the period of limitation was not extended by the 1954 amendment, § 33 is unconstitutional as to him.[2]

Under the 1954 amendment, the first sentence of § 33, relating to notices of claims, was amended to read as quoted in the margin.[3] With respect to property (such as that here in question) acquired by the United States on or after December 18, 1941, the time for filing a notice of claim was extended to February 9, 1955, or two years from the vesting, "whichever is later." It follows that the instant notice of claim,

---

[2] An additional contention by appellee that this statute of limitations was tolled on account of war was abandoned after the decision in Soriano v. United States, 352 U.S. 270, decided on January 14, 1957.

[3] The first sentence of § 33 (50 U.S.C.A. App. § 33), as amended in 1954, reads:

"No return may be made pursuant to section 9 or 32 [section 9 or 32 of this Appendix] unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later: except that return may be made to successor organizations designated pursuant to section 32(h) of this Appendix if notice of claim is filed before the expiration of one year from August 23, 1954." 68 Stat. 7, ch. 4; 68 Stat. 768, ch. 830, § 2.

which was filed on October 17, 1950, was timely under the 1954 amendment.

The 1954 amendment, however, made no change in the second sentence of § 33, which relates specifically to the period of limitation for filing a suit pursuant to § 9. That part of § 33 still expressly provides that no such suit may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure or vesting, "whichever is later." The proviso attached to that sentence still tolls the running of this two-year period only if, *during such period*, a claim or suit pursuant to § 9 or § 32 (a) was pending. Pass v. McGrath, (D.C.Cir.) 192 F. (2d) 415, cert. denied, 342 U. S. 910. As before noted, no claim or suit was filed during the two-year period following vesting of the property in question on December 17, 1947.

Appellee argues, however, that, since the 1954 amendment extended the time for filing notices of claim, the tolling provision of § 33 should be read as providing that such period of limitation is tolled during the pendency of a claim if the notice of claim is filed *at any time* during the extended period provided by the 1954 amendment.

No court has sanctioned such a disregard of the express language of the last sentence of § 33. On the contrary, two district courts have rejected a like contention.[4] No court of appeals has passed upon the

[4] Pedersen v. Brownell, (D.Ore.) 129 F.Supp. 952; Grabbe v. Brownell, (E.D.N.Y.) 140 F. Supp. 4.

matter since the 1954 amendment was enacted. In the Pass case, decided in 1951, the vesting occurred in 1943. The notice of claim was filed in September, 1946, and was therefore timely. The suit was filed in October, 1949, which was after the April 30, 1949 deadline specified in the last sentence of § 33. It was contended that, since the notice of claim was timely filed and was still pending, the period of limitation for bringing suit had been tolled. It was held, however, that since the notice of claim was not filed within two years of the vesting, it could not serve to toll the period of limitation. The principle thus established is that a notice of claim may be timely, within the meaning of the first sentence of § 33, and yet fail to extend or toll the period of limitation for bringing suit.

If that could happen under § 33, as amended in 1948, it is difficult to see why, under similar facts, it could not happen under the 1954 version of the section, since no change was made in the tolling provision. Here the notice of claim was timely filed within the meaning of § 33, as amended in 1954. But it was not filed within two years of the vesting, and so could not serve to toll the period of limitation for bringing suit.

In our view, the 1954 amendment does not indicate an intention on the part of Congress to reject the construction of the tolling provision of § 33, as announced in Pass v. McGrath.

Appellee asks us to discount Pass as stating principles of statutory construction at variance with three

cases which he cites.[5] These decisions make it clear that the letter of the Trading with the Enemy Act is not to be regarded as controlling where it is plainly contrary to the spirit and policy of the legislation and to the intention of Congress. While Pass v. McGrath gave effect to the letter of the act, we do not read it as ignoring the spirit and policy of the legislation or the intention of Congress.

Turning to the case before us, we find no indication that the spirit or policy of the 1954 amendment of § 33, or the intention of Congress in enacting it, runs counter to the express provisions of the last sentence of that amended section. On the contrary, the fact that Congress chose to retain the provision of § 33 limiting the tolling of the period of limitation, after it was construed in Pass v. McGrath in the manner indicated, is some evidence of congressional satisfaction with that construction.

The argument upon which appellee seems to place greatest reliance is based upon the fact that the notices of claim referred to in the first sentence of § 33 are expressly made conditions precedent to the procedures specified in § 9 as well as § 32. Appellee contends that the administrative provisions of § 9 either have been superseded by § 32, or relate only to World War I. Hence, he argues, the only part of § 9 procedure to which notices of claim could have been pertinent when the 1954 amendment was enacted was that which re-

[5]Markham v. Cabell, 326 U.S. 404, 409; Guessefeldt v. McGrath, 342 U.S. 308, 319; Vowinckel v. First Federal Trust Co., (9 Cir.) 10 F. (2d) 19.

lates to suits. Appellee concludes from this that unless the extended period for filing such claims was intended to extend the time for filing suits, the reference to § 9 in the first sentence of § 33, as amended in 1954, is meaningless.

The premise upon which this argument is based does not, in our view, support the conclusion reached. Appellee concedes that the administrative provisions of § 9 have not been superseded by § 32, in so far as World War I claims are concerned.* It follows that the reference to § 9 in the first sentence of § 33, as amended, serves a purpose other than that relating to suits. This being the case, insistence upon the time limits for bringing suit, as specified in the last sentence of § 33, does not render meaningless the reference to § 9 in the first sentence of that section.

Appellee makes reference to the legislative history of § 33. We find, in this history, no basis for disregarding the express language of the last sentence of § 33. House Report No. 1114, 83d Congress, in which the Committee on Interstate and Foreign Commerce recommended passage of S.373, amending § 33, refers to the extension of time for filing "claims." The closest which this report comes to stating the purpose of the extension is this language: "so that persons such as

*This must be true because § 32, the only other section which provides for administrative returns, by its terms excludes its application to "any property or interest acquired by the United States prior to December 18, 1941." Section 33 does not refer to "World War I" claims or "World War II," claims, but, rather, to claims relating to property (a) acquired by the United States prior to December 18, 1941, and (b) acquired on or after December 18, 1941.

those described earlier in the report may seek the return of their property.'" Appellee argues that the word "claims" can be construed as including both administrative claims and suits. While this construction is possible, it is by no means clear that the committee used the word in that sense. In our opinion, the committee report does not indicate a plain intent to extend the time for filing suits.

There are attached to this committee report letters concerning the legislation submitted by various agencies of the government. A letter submitted by the War Claims Commission[8] indicates that the chairman of that agency probably thought the proposed extension of time would affect suit procedure under § 9. On the other hand, a letter submitted by the Department of Justice[9] indicates a contrary construction, since it refers to S.373 as a bill "to extend the time for the filing of administrative claims. . . ." Legislative history of this kind is inconclusive.

For the reasons indicated above, we conclude that the instant suit was not timely filed within the meaning of § 33, as amended in 1954.

Appellee contends that, if § 33 is so construed as to deprive him of the right to sue for the return of the vested property, it is unconstitutional as to him.

The factual basis for this argument is predicated upon the circumstance that appellee, then a medical

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[7] H. R. Rep. 1114, 83d Cong., 2d Sess. (1954), reported in 1954-2 U. S. Code Cong. & Ad. News 1997, 1998.

[8] 1954-2 U. S. Code Cong. & Ad. News 1999.

[9] Id. at 2005.

officer in the Japanese army, was a prisoner of war in Siberia at the time of the vesting, and until December 4, 1948, when he was repatriated to Japan. It was not until April 6, 1949, that appellee, then subject to regulations imposed upon an occupied country, could be said to have access to the courts of the United States.[10] Since the vesting occurred on December 17, 1947, the period of limitation for filing suit was December 16, 1949. It is argued that the eight and a half months between April 6 and December 16, 1949, is not a reasonable period of time to allow for the bringing of such a suit.

The power of Congress to provide for an immediate seizure in war times of property supposed to belong to the enemy is dependent upon adequate provision being made for its return in case of mistake. Central Trust Co. v. Garvan, 254 U. S. 554, 566. Whether adequate provision for such return has been made depends, among other things, on whether the period of limitation for the bringing of suits for return of seized property is reasonable. Appellee is therefore correct in contending that the reasonableness of the period of limitations presents a constitutional question.

We are not persuaded, however, that the reasonableness of the period, in the constitutional sense, is to be judged by the hardship or lack of hardship disclosed

[10]Regulations of the occupation authorities in Japan prohibited transmittal to the United States of "papers of legal procedure" until April 6, 1949. H. R. Rep. 1114, 83d Cong., 3d Sess. (1954), reported in 1954-2 U.S. Code Cong. & Ad. News 1997, 1998.

under the facts of a particular case. Nor is the fact that, for a period, appellee was involuntarily deprived of access to the courts because of war, a controlling consideration. This would be just another way of saying that the period of limitation is tolled by war, a contention rejected in the recent Soriano case, supra.

The period of limitation set by Congress was until April 30, 1949, or until two years after vesting, with the provision that this period would be tolled by the pendency of any claim filed during that two-year period. In our view, this was a reasonable allowance of time, and there is no constitutional reason why it should not be applied according to its terms.

Since the instant suit was not filed within the period of limitation specified in § 33, the district court was without jurisdiction to entertain the suit. Accordingly, the judgment for appellee is

Reversed.

(Endorsed:) Opinion. Filed Apr. 5, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 15,197

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian,
Appellant,

vs.

Morizo Nakashima, etc.,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed.

(Endorsed) Judgment: Filed and entered: April 5, 1957. Paul P. O'Brien, Clerk.